

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 30, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cytozyme Laboratories, Inc.

v.

JH Biotech, Inc.

Opposition No. 91244593

Peter M. de Jonge of Thorpe North & Western LLP,
for Cytozyme Laboratories, Inc.

Ralph D. Chabot of the Law Office of Ralph D. Chabot,
for JH Biotech, Inc.

Before Taylor, Bergsman, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

JH Biotech, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark SEEDUP for “Microbial inoculants for application to seeds used in agriculture” in International Class 1.¹

¹ Application Serial No. 87953971, filed on June 8, 2018, originally based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming June 7, 2018 as both the date of first use and the date of first use in commerce.

Cytozyme Laboratories, Inc. (“Opposer”) opposes the registration of Applicant’s mark on the grounds of (1) likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on both its alleged prior common law use and pleaded registration issued on the Principal Register for the mark SEED+,² in standard character form, for “Plant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds” in International Class 1; and (2) dilution.³

In its answer to the notice of opposition, Applicant denied the salient allegations asserted therein.⁴ Additionally, Applicant asserted the purported “affirmative defense” that the term SEED in Opposer’s pleaded mark is weak and, therefore, is entitled to limited protection.⁵ We construe this defense not as a true affirmative defense but rather as a mere amplification of Applicant’s denials of the allegations in the notice of opposition. *See Order of Songs of It. in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995).

We also note that Opposer did not pursue its dilution claim at trial or at briefing. Accordingly, Opposer’s dilution claim is waived. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's

² Registration No. 4192979 registered August 21, 2012; Sections 8 and 15 affidavits accepted and acknowledged.

³ *See* Opposer’s Notice of Opposition, 1 TTABVUE.

⁴ *See* Applicant’s Answer, 4 TTABVUE.

⁵ *Id.*; 4 TTABVUE 3.

pleaded descriptiveness and geographical descriptiveness claims not argued in brief deemed waived).

I. The Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's involved application file. The record also includes the evidence summarized below.

A. Opposer's Evidence

1. Testimony Declaration of Eric Chandler Baughman ("Baughman Decl."), Opposer's Chief Executive Officer, and the following accompanying exhibits: (a) promotional materials for Opposer's products sold under its SEED+ mark; (b) product labels for Opposer's products sold under its SEED+ mark; (c) screenshots purportedly from Opposer's website describing the products sold under Opposer's SEED+ mark; (d) copies of Applicant's promotional materials for goods sold under its involved SEEDUP mark; and (e) copy of an online article from the Organic Materials Review Institute that purportedly classifies Applicant's products as "crop fertilizers and soil amendments."⁶
2. Opposer's Notice of Reliance on the following: (a) status and title copy of Opposer's pleaded Reg. No. 4192979 for the mark SEED+; (b) copy of an image of a product sold by Applicant bearing the applied-for mark SEEDUP; (c) copy of an informational flier of a product sold by Applicant bearing the opposed mark SEEDUP; (d) copy of a safety data sheet of a product sold by Applicant bearing the opposed mark SEEDUP; (e) copy of a product brochure for a product sold by Applicant bearing the opposed mark SEEDUP; (f) status and title copies of the following third-party registered marks: SEEDNET, MAX SEED SOLUTIONS and design, and

⁶ 13 TTABVUE. In Paragraph 22 of Mr. Baughman's testimony declaration, Mr. Baughman references a hyperlink to the website www.arbico-organics.com without providing a copy of the article referenced. Providing hyperlinks to Internet materials is insufficient to make such materials of record. *In re Powermat Inc.*, 105 USPQ2d 1789 (TTAB 2013) (citing *In re HSB Solomon Associates LLC*, 102 USPQ2d 1269 (TTAB 2012)). Accordingly, we give no consideration to Opposer's reference to this website hyperlink or any testimony provided in reliance thereon.

DLF INTERNATIONAL SEEDS SEEDS & SCIENCE and design; (g) Applicant's first amended responses to Opposer's first set of interrogatories and document requests; and (h) dictionary definitions of the terms "plus" and "up".⁷

3. Opposer's Rebuttal Notice of Reliance on the following: (1) screenshots from the website www.agilifeusa.com displaying various information about the Biomantra SEED product; and (2) dictionary definitions of numerous terms.⁸

B. Applicant's Evidence

1. Copy of the transcript of the cross-examination testimony deposition of Opposer's Chief Executive Officer, Mr. Baughman;⁹
2. Copy of the corrected transcript of the cross-examination testimony deposition of Opposer's Chief Executive Officer, Mr. Baughman;¹⁰
3. Testimony Declaration of Tasha McDonald, a person associated with Applicant's counsel's law firm, and the following accompanying exhibits: (1) proof of purchase and pictures of the following third-party products: Seedlingers, Bimantra Seed+, Pennington Smart Seed, Scotts EZ Seed, DeltAg Seed Coat, AgriGro's SeedMaxx, and (2) screenshot from third-party Soil Moist's website offering for sale the SEED COAT

⁷ 12 TTABVUE.

Additionally, Opposer's Notice of Reliance states that the materials submitted thereunder are "relevant to the issue of likelihood of confusion." Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g), provides, in relevant part, that "[f]or all evidence offered by notice of reliance, the notice must indicate generally the relevance of the evidence and associate it with one or more issues in the proceeding." To meet the requirement that the notice of reliance indicate the general relevance of material being offered, the offering party should associate the materials with a **specific factor** relevant to likelihood of confusion or a specific fact relevant to determining a particular issue. *See Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010). Merely stating that the materials submitted are relevant to the issue of likelihood of confusion alone is insufficient. However, since Applicant did not object to this insufficiency, such requirement is waived and we will consider the materials for whatever probative value they have.

⁸ 25 TTABVUE.

⁹ 16 TTABVUE.

¹⁰ 19 TTABVUE.

product;¹¹

4. Applicant's First Notice of Reliance on the following: (1) copy of Applicant's First Set of Interrogatories, (2) Opposer's second amended responses to Applicant's First Set of Interrogatories, and (3) Opposer's first amended responses to Applicant's Second Set of Interrogatories;¹²
5. Opposer's response to Applicant's Interrogatory Request Nos. 28 and 29 filed under seal as confidential;¹³
6. Applicant's Second Notice of Reliance on the following: (1) status and title copies of third-party registrations that include the terms SEED, PLUS or the symbol "+" as part of the registered mark; and (2) a listing of search results retrieved from a USPTO database of marks including the term PLUS or the symbol "+" as part of the mark for goods including "fertilizers";¹⁴ and
7. Applicant's Third Notice of Reliance on screenshots from various third-party websites, including online retailers, that sell or offer plant fertilizers under marks that include the terms SEED, PLUS or the symbol "+".¹⁵

II. Preliminary Matters

A. Opposer's Evidentiary Objection

Opposer objects to Applicant's submission under its third notice of reliance of a printout of a Wikipedia entry defining and providing the history of the plus and minus symbols (Exhibit 185).¹⁶ The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so

¹¹ 20 TTABVUE.

¹² 21 TTABVUE.

¹³ 22 TTABVUE.

¹⁴ 23 TTABVUE.

¹⁵ 24 TTABVUE.

¹⁶ Appendix of Opposer's Trial Brief, 29 TTABVUE 30-31.

long as the non-offering party has had an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007). During its rebuttal testimony period, Opposer had the opportunity to submit evidence to rebut or call into question the accuracy of Applicant's Wikipedia submission. Opposer failed to do so. Accordingly, Opposer's objection is overruled and we give Applicant's submission the probative value it merits, keeping in mind the inherent limitations of Wikipedia entries.

B. Applicant's Evidentiary Objections

Applicant objects to Opposer's CEO's declaration testimony (Baughman Decl.) on the grounds that (1) the testimony lacks foundation, is speculative in nature, and assumes facts not in evidence, and (2) the testimony constitutes improper expert opinion testimony from a non-expert. Applicant also seeks to exclude exhibits to the declaration (Exhibits 6-9) and testimony provided in relation thereto, as well as exhibits submitted under Opposer's notice of reliance (Exhibits 3-6) that, according to Applicant, were not properly authenticated and, therefore, are inadmissible.

As to the testimony declaration itself, "the Board generally does not strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, the Board considers such objections when evaluating the probative value of the testimony at final hearing." *Bd. of Regents v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1194 n.19 (TTAB 2014) (citations omitted). We therefore overrule the objection but will weigh the relevance and strength or weakness of the objected-to

testimony, including any inherent limitations therein. For example, we have disregarded any opinion testimony regarding the conclusions of law in this case. *Alcatraz Media, Inc.*, 107 USPQ2d at 1755. That being said, we have considered any factual testimony based on Mr. Baughman's personal knowledge and business experience in his field. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.")

Turning to the objected-to exhibits attached to Mr. Baughman's declaration, we first note that Mr. Baughman did not authenticate any of these exhibits. We further note that Exhibits 7-9 contain bates stamped numbers that indicate that Applicant produced these documents during discovery. Trademark Rule 2.120(k)(3)(ii), 37 C.F.R. 2.120(k)(3)(ii), provides that "[a] party that has obtained documents from another party through disclosure or under Rule 34 of the Federal Rules of Civil Procedure may not make the documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under the provisions of § 2.122(e), or the party has obtained an admission or stipulation from the producing party that authenticates the documents. The record does not demonstrate that the exceptions to Trademark Rule 2.120(k)(3)(ii) are applicable here. Accordingly, Applicant's objection to the admissibility of Exhibits 7-9 attached to Mr. Baughman's testimony declaration, as well as any testimony provided in relation thereto, is sustained under Trademark Rule 2.120(k)(3)(ii). We therefore have given no

consideration to these documents or any testimony concerning these documents in our analysis.

As for Exhibit 6, Applicant contends that although Mr. Baughman testified that the website screenshot comprising this exhibit is a copy of Opposer's website that describes its goods, Opposer is in fact not the owner of the website since the URL and the copyright information identifies a third-party, i.e., Veresian Life Sciences. While Applicant's objection puts the veracity of Mr. Baughman's testimony regarding the ownership of this particular website into question, we nonetheless find the exhibit itself is admissible since the webpage screenshot is self-authenticating because it contains the URL from where it was retrieved and the date the website was accessed. Moreover, Mr. Baughman provided testimony regarding the truth of the statements made in the website. Accordingly, Applicant's objection to this exhibit is overruled.

Turning to Exhibits 3-6 submitted under Opposer's notice of reliance, we again note that these exhibits were not authenticated by Opposer. We further note that Exhibits 5 and 6 also contain bates stamp numbers with Applicant's initials. Thus, these documents also appear to have been produced by Applicant during discovery. For the same reasons explained above, we sustain Applicant's objection under Trademark Rule 2.120(k)(3)(ii) as to these documents and have given them no consideration.

As for Exhibit 4 submitted under Opposer's notice of reliance, we note that this document is identical to Exhibit 8 attached to Mr. Baughman's testimony declaration. For the same reasons provided above, we give no consideration to this document.

Finally, Exhibit 3 submitted by Opposer under its notice of reliance consists of a photograph purportedly of the back label of Applicant's SEEDUP product. While Applicant's objection to this exhibit is untimely, *see Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1016 (TTAB 2015) (objection to authentication waived as objection was not made at trial when alleged defect could be cured), this type of evidence is nonetheless not admissible under a notice of reliance alone. *See* Trademark Rules 2.120(k) and 2.122(d)(2) and (e)(1), 37 C.F.R. § 2.120(k) and 2.122(d)(2) and (e)(1). Because Opposer has not provided any testimony or any other evidence to authenticate this particular photograph, the exhibit is inadmissible and we have given it no consideration.¹⁷

Notwithstanding the foregoing, to the extent that either party has submitted any Internet materials that include the URL from which the website was accessed, as well as the access date, but provided no testimony regarding the truth of the statements contained in these websites, we will not consider statements made in these website printouts as proof of the truth of the matter asserted. However, such materials are frequently competent to show, on their face, matters relevant to trademark claims (such as public perception), regardless of whether the statements are true or false. Accordingly, they will not be excluded outright, but considered for what they show on their face." *Harry Winston, Inc. and Harry Winston S.A. v. Bruce*

¹⁷ We note that the photograph Opposer attempts to introduce into evidence appears to be identical to the specimen of use submitted by Applicant with its application. While Opposer is not permitted to introduce documents produced by Applicant under a notice of reliance alone for the reasons explained above, the photograph is nonetheless part of the record because it is part of Applicant's application file. *See* Trademark Rule 2.122(b).

Winston Gem Corp., 111 USPQ2d 1419, 1427-28 (TTAB 2014).

C. Applicant's Motion to Amend Filing Basis of its Involved Application

On April 30, 2019, Applicant filed a motion to amend the filing basis of its involved application from a use-based application to an intent-to-use application.¹⁸ By order dated May 29, 2019, the Board, *inter alia*, deferred consideration of Applicant's motion to amend until final decision. In its trial brief, Opposer acknowledges Applicant's motion to amend and the Board's order deferring consideration of the same but does not contest or argue the merits of Applicant's motion. Thus, Applicant's motion to amend its application is granted as conceded. *See* Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a).

D. Applicant's Motion to Strike Opposer's Rebuttal Notice of Reliance

On October 23, 2020, Applicant filed a motion to strike Opposer's rebuttal notice of reliance in its entirety.¹⁹ In support of its motion, Applicant argues that the materials submitted under Opposer's rebuttal notice of reliance constitute improper rebuttal because they do not counter, clarify or correct Applicant's submitted evidence.²⁰ Instead, Applicant maintains that the materials merely support Opposer's case-in-chief.²¹

In contesting the motion, Opposer initially contends that Applicant's motion to

¹⁸ 6 TTABVUE.

¹⁹ 26 TTABVUE.

²⁰ 26 TTABVUE 2-3.

²¹ *Id.*

strike was improper at the time it was filed since any substantive objections to a notice of reliance, including that the material is not proper rebuttal, should be raised in or with the objecting party's brief on the case or in an appendix or separate statement of objections attached to the brief.²²

As to the merits of Applicant's motion, Opposer argues that the stated relevance of the rebuttal evidence is a direct response to Applicant's evidence. For example, Opposer contends that it provided evidence supporting the strength of its mark to rebut evidence Applicant submitted allegedly showing the weakness of Opposer's mark.²³ Further still, Opposer contends that an examination of the evidence it under its rebuttal notice of reliance clearly shows that each piece of evidence is directly related to evidence submitted by Applicant under its own notices of reliance. For example, Opposer maintains that Applicant submitted evidence regarding a product titled Biomantra SEED+.²⁴ Opposer asserts that the evidence Opposer submitted under its rebuttal notice of reliance addresses this same product.²⁵

Opposer further states that Applicant submitted evidence of third-party products sold or third-party registrations bearing either the term SEED or PLUS. For example, Applicant submitted evidence of webpages for products titled TRIPLE 8 PLUS 8-8-8 and Turf Plus under its notice of reliance.²⁶ In rebuttal, Opposer contends

²² 27 TTABVUE 3.

²³ *Id.*

²⁴ 27 TTABVUE 4.

²⁵ *Id.*

²⁶ *Id.*

that it submitted evidence of dictionary definitions for the terms “triple” and “turf.”²⁷ Opposer argues that each piece of evidence it submitted in its rebuttal evidence relates directly to product pages or registrations submitted by Applicant in its own notices of reliance.

We agree with Opposer. First, Opposer is correct that an objection to a rebuttal notice of reliance on the ground that the rebuttal evidence is improper rebuttal evidence should be raised at briefing. *See* TBMP 707.02(c) (2021) (“[a]n adverse party may object to a notice of reliance on substantive grounds, such as that evidence offered under the notice constitutes . . . improper rebuttal . . . [o]bjections of this nature normally should be raised in or with the objecting party’s brief on the case or in an appendix or separate statement of objections attached to the brief.” Notwithstanding, we exercise our discretion and consider the merits of Applicant’s motion.

After a careful review of both the evidence submitted by Applicant during its trial period and the evidence submitted by Opposer in rebuttal, we find that the rebuttal evidence submitted by Opposer clearly constitutes proper rebuttal.

Accordingly, Applicant’s motion to strike Opposer’s rebuttal notice of reliance is denied.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is an essential element in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d

²⁷ *Id.*

1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)).²⁸ A plaintiff may oppose registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020).

Because Opposer's pleaded registration is of record, Opposer has met the requirements for establishing a statutory cause of action to oppose Applicant's involved application. *See N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)). This registration forms the basis for a likelihood of confusion claim under 15 U.S.C. § 1052(d) that is not wholly without merit. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). *See also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012). Applicant does not dispute Opposer's entitlement to a statutory cause of action.

²⁸ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063–64, under the rubric of “standing.” Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 953 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh'g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), petition for cert. filed. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

III. Section 2(d) Claim – Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its mark and that use of Applicant’s mark is likely to cause confusion, mistake, or deception as to the source or sponsorship of Applicant’s identified services, *Cunningham*, 55 USPQ2d at 1848.

A. Priority

Because Opposer’s pleaded registration for the standard character mark SEED+ is of record, priority is not an issue with respect to the goods identified in Opposer’s pleaded registration. *See Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108,110 (CCPA 1974)).

B. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (*DuPont*). *See also In re Majestic*

Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

1. Similarity of the Goods

We first address the second *DuPont* likelihood of confusion factor focusing on the comparison of the goods identified in Applicant’s application vis-à-vis the goods identified in Opposer’s pleaded registration. See e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs. Inc.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); see also *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223

USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or offered by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for goods of the types listed in both Applicant's application and Opposer's pleaded registration. *See In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods at issue, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Applicant's goods are identified as "Microbial inoculants for application to seeds used in agriculture." Opposer's goods are identified as "Plant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds."

The term inoculant is defined as an "inoculum" which in turn is defined as "a substance suitable for inculcating."²⁹ Inoculate is defined as "to introduce (something,

²⁹ Merriam-webster.com (accessed on August 31, 2021). The Board may take judicial notice

such as a microorganism) into a suitable situation for growth.”³⁰ Thus, based on these definitions, Applicant’s goods may aptly be characterized as microbial inoculants applied to seeds that help plant growth.

Opposer’s goods include “Plant growth nutrients for treatment of seeds for use in agriculture.” Thus, we find from the face of the identifications that the parties’ respective goods are inherently related inasmuch as the overlapping purpose of the goods is to promote plant growth. Moreover, Applicant concedes that the goods at issue are similar for likelihood of confusion purposes.³¹

Thus, the second *DuPont* factor favors a finding of likelihood of confusion.

2. Similarity of Trade Channels/Classes of Purchasers

The third *DuPont* factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Here, there are no trade channel or class of purchaser limitations in either Applicant’s identification of goods or Opposer’s identification of goods set forth in its pleaded registration. Thus, we presume that Opposer’s goods and Applicant’s goods travel through all usual channels of trade for such goods, namely, online retailers, plant nurseries, and retail establishments that feature agricultural goods, and are offered to all normal potential purchasers for such goods, i.e., farmers or persons who otherwise work in the field of

of dictionary definitions, including online dictionaries that exist in printed format. *See, e.g., Performance Open Wheel Racing, Inc. v. U.S. Auto Club Inc.*, 2019 USPQ2d 208901, at *4 n.34 (TTAB 2019).

³⁰ merriam-webster.com (accessed on August 31, 2021).

³¹ Applicant’s Appeal Brief, p. 17; 30 TTABVUE 22.

agriculture.³²

Thus, the third *DuPont* factor favors a finding of likelihood of confusion.

3. Sophistication of Consumers

“The fourth DuPont factor considers ‘[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.’” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that because Opposer utilizes a third-party sales force to provide technical advice to prospective customers, these prospective buyers would be an “informed, sophisticated Agrifarm customer.”³³ In support of its argument, Applicant refers to the cross-examination of Opposer’s witness, Mr. Buaghman, who admitted during cross-examination that Opposer’s prospective customer would have to first speak with a sales representative before placing an order for Opposer’s goods and that Opposer’s websites do not allow for direct ordering of the product.³⁴

We agree with Applicant but only to the extent that, in light of the nature of the parties’ respective goods, i.e., seed nutrients used in agriculture, the relevant consumers of both Opposer’s and Applicant’s goods would exercise a higher degree of

³² We note that both Opposer and Applicant have introduced extrinsic evidence in an attempt to limit the parties’ trade channels and classes of purchasers, as well as the price point of the parties’ respective goods. The Board, however, may not read limitations or restrictions as to trade channels, classes of purchasers, or the price point of the goods at issue into Opposer’s unrestricted registration or Applicant’s unrestricted application, nor may the Board resort to the use of extrinsic evidence to restrict them. *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020) (citing *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)); see also *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, we have given no consideration to this extrinsic evidence in our analysis.

³³ Applicant’s Trial Brief, pp. 20-21; 30 TTABVUE 25-26.

³⁴ 19 TTABVUE 10-11 and 14-16.

care in their purchasing decision of the parties' respective goods. While we find that the relevant consumers of the parties' respective goods would exercise a higher degree of care in purchasing the parties' goods, because there is an insufficient amount of evidence of record to ascertain the degree or level of their sophistication, we find the fourth *DuPont* factor only slightly favors a finding that confusion is unlikely.

4. Strength of Opposer's SEED+ Mark

“In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition.” *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

a. Conceptual Strength

With regard to the conceptual strength of Opposer's SEED+ mark, Opposer's Registration No. 5545861 for the standard character mark SEED+ was issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, because no challenge to the lack of inherent distinctiveness of Opposer's SEED+ has been lodged by Applicant, we find Opposer's SEED+ mark, when viewed in its entirety, is inherently distinctive and, therefore, it should be entitled to the normal scope of protection accorded an inherently distinctive mark.

That being said, the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance which undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

Here, Applicant has submitted numerous third-party registrations for marks that include the terms SEED, PLUS or the symbol “+” as part of the registered mark for goods similar to those identified in Opposer’s pleaded registration.³⁵ A representative sample of such registered marks are as follows: SEED RANCH, SEEDMAX, SEEDLINGERS, SEEDNET, SEEDWORX, SEEDCOAT, VEG+ BLOOM, UP TIME PLUS, HYDRATE PLUS NF, TRANSPLUS, OPTIMUM PLUS, HUNTER PLUS, FULLTEC + PLUS, BORON PLUS, PHYTO-PLUS, SUPERMN+.

We further find that the term “SEED” in Opposer’s pleaded mark is highly descriptive of Opposer’s goods, particularly since the term “seed” appears in

³⁵ Applicant’s Notice of Reliance, Exhs. 126-183; 23 TTABVUE 10-157.

Opposer's identification of goods. Thus, Applicant's third-party registration evidence, including the fact that the term "seed" is, at a minimum, highly descriptive of Opposer's goods, demonstrate that the constituent components of Opposer's pleaded SEED+ mark have been commonly registered by third parties for goods similar to those listed in Opposer's SEED+ pleaded registration.

Additionally, the evidence of record includes the definition of the term "plus" which is defined, *inter alia*, as "having, receiving, or being in addition to what is anticipated" and "possessing a specified quality to a high degree."³⁶ Therefore, as used in the third-party registrations, the word "plus" is at a minimum highly suggestive, if not laudatory in nature, and engenders a commercial impression that the product identified by the "plus" mark is a superior product.

We therefore find that, notwithstanding the fact that Opposer's pleaded SEED+ mark is registered on the Principal without a showing of acquired distinctiveness, the individual components of Opposer's pleaded mark, *i.e.*, the term "SEED" and the plus symbol, are nonetheless conceptually weak in relation to Opposer's goods.

b. Commercial Strength of Opposer's SEED+ Mark

Opposer argues that its SEED+ mark is commercially strong.³⁷ Commercial strength "may be measured indirectly by the volume of sales and advertising expenditures in connection with the [goods or] services sold under the mark, and other factors such as length of time of use of the mark; widespread critical

³⁶ Opposer's Notice of Reliance, Exh. 12; 12 TTABVUE 114.

³⁷ Opposer's Trial Brief, pp. 18-19; 29 TTABVUE 25-26.

assessments; notice by independent sources of the [goods or] services identified by the mark []; and the general reputation of the [goods or] services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017).

To demonstrate the commercial strength of its SEED+ mark in connection with the goods recited in its pleaded Registration No. 4192979, Opposer submitted a variety of evidence. The evidence of record shows: (1) that since at least June 1976, Opposer has used the mark SEED+ in interstate commerce for providing “plant growth nutrients for treatment of seeds for use in agriculture, horticulture and forestry, plant nutrition preparations for the treatment of seeds”;³⁸ (2) in 2018, Opposer or its partners spent, at least, \$459,300 on advertising for products bearing the SEED+ mark in the United States;³⁹ (3) Opposer’s sales of its SEED+ product amounted to \$16,813 in 2013, \$600 in 2015, \$25,280 in 2018 and \$78,400 from 2019 to the present;⁴⁰ and (4) Opposer’s goods under its SEED+ mark are typically sold through a wide variety of trade channels, including direct sales, through catalogs, online, at trade shows, through distributors and third parties, brick and mortar retail stores, home improvement stores, and plant nurseries.⁴¹

Viewing Opposer’s commercial strength evidence in its totality, we find that the

³⁸ Baughman Decl., ¶ 3; 13 TTABVUE 3.

³⁹ Opposer’s response to Applicant’s Interrogatory No. 11; 21 TTABVUE 33.

⁴⁰ Opposer’s response to Applicant’s Interrogatory No. 10; 21 TTABVUE 32. We note that Opposer states that it had zero sales in 2014, 2016, and 2017 and provided no sales figures prior to 2013, *see id.*, notwithstanding the fact that Opposer has stated that it has been using its SEED+ mark since June 1976.

⁴¹ Baughman Decl., ¶ 18; 13 TTABVUE 6.

evidence is insufficient to demonstrate that Opposer's SEED+ mark is commercially strong. We initially note that the length of time Opposer has used its SEED+ mark in commerce for the goods listed in its pleaded registration, standing alone, is insufficient to establish that its mark has achieved such commercial renown that it may be considered a very strong mark. Moreover, Opposer has not submitted any evidence regarding annual advertising and marketing expenditures for its SEED+ goods or the extent of such advertising and marketing. Additionally, Opposer has not submitted any evidence concerning unsolicited media attention or industry accolades received for its SEED+ product. Finally, Opposer's self-serving testimony that customers familiar with Opposer's goods have come to know and recognize the SEED+ mark in connection with Opposer's goods is of little probative value, particularly since Opposer has not submitted any evidence demonstrating consumer recognition of its SEED+ mark.⁴²

Based on the totality of the evidence submitted by Opposer, we find that Opposer has demonstrated that its SEED+ mark has only attained minimal or limited commercial success and renown when used in association with the goods identified in its pleaded Registration No. 4192979.

⁴² Opposer also failed to submit any evidence to demonstrate (1) how its sales compare to its competitors in the industry, (2) how many times consumers encounter its SEED+ mark for the goods provided thereunder, or (3) any context for its achievements in the goods it provides under its SEED+ mark, e.g., market share. Without comparative numbers or market share percentages, it is difficult to place the apparent success or renown of Opposer's SEED+ mark into context. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002); *cf. Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) ("Market share is but one way of contextualizing ad expenditures or sales figures.").

5. Similar Marks on Similar Goods – 6th *DuPont* Factor

We next address the sixth *DuPont* factor, the number and nature of similar marks in use on similar services. *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). Here, Applicant has submitted evidence of third-party use of marks for goods similar to those of Opposer, i.e., Seedlingers, Bimantra Seed+, Pennington Smart Seed, Scotts EZ Seed, DeltAg Seed Coat, AgriGro's SeedMaxx, and SEED COAT.⁴³

In light of the foregoing evidence, we find that a mark comprising, in whole or in part, the term “seed” used in connection with goods identical or similar to those of Opposer should be given a restricted scope of protection. *See Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010); *see also Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983).

In sum, Opposer's SEED+ mark is not entitled to such a broad scope of protection that it is a bar to the registration of every mark comprising, in whole or in part, the word “seed”; it will only bar the registration of marks as to which the resemblance to Opposer's mark is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two.

6. Similarity of the Marks

We next consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay*

⁴³ Applicant's Notice of Reliance, Exhs. 101-122; 20 TTABVUE 12-101.

Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ.2d 1689 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs.*, 101 USPQ2d at 1721).

Because this factor is based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in assigning more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data*, 224 USPQ at 751.

Opposer’s mark subject to its pleaded Registration No. 5545861 is SEED+ in standard characters. Applicant’s involved mark is SEEDUP also in standard

characters. The marks are visually and aurally similar since they both begin with the word “seed.” However, while we acknowledge that it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered when making purchasing decisions, see *Palm Bay Imps.*, 73 USPQ2d at 1692, the term “seed” is highly descriptive of each of the parties’ respective goods. This especially holds true since the term “seed” is included in both Opposer’s and Applicant’s identification of goods. Matter that is descriptive of or generic for a party’s goods is typically less significant or less dominant in relation to other wording in a mark. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int’l. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)); *In re Code Consultants Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (a descriptive term is less significant in creating the mark’s commercial impression).

Thus, we need to look to the other elements of each of the parties’ mark, i.e., the plus symbol in Opposer’s mark and the term “up” in Applicant’s mark. The dictionary definition of the word “plus” is defined as “possessing a specified quality to a high degree,” “greater than that specified,” or “an added quantity.”⁴⁴ “Up” is defined as “in

⁴⁴ Opposer’s Notice of Reliance, Exh. 12; 12 TTABVUE 114. Opposer has submitted the submitted the dictionary definitions for the words “PLUS” and “UP” and argues confusion is likely because a synonym for each word is the term “increase.” See Opposer’s Trial Brief, pp. 13-14, 29 TTABVUE 20-21. A closer review of Opposer’s dictionary definition of “PLUS” includes a highlighted passage in a section having the heading entitled “Kids Definition of plus,” which defines the term “plus” as “increase.” Opposer relies on this particular definition to support its argument that the terms UP and PLUS are synonymous. A child’s definition of the term “plus,” however, is not probative in our analysis since a child would not be considered an average purchaser of Opposer’s product given the nature of the product itself. Thus, we have given no consideration to this particular definition.

or into a higher position or level” or “being in a raised position.”⁴⁵

Based on these definitions, we find that the parties’ respective marks are dissimilar in meaning and engender differing overall commercial impressions, notwithstanding the common term “seed” in each mark. Specifically, Opposer’s pleaded SEED+ mark, when viewed in the context of its goods, evokes a meaning that its products provide something additional or are of a higher quality (i.e., superior seeds). In contrast, Applicant’s SEEDUP mark suggests a command or an indication that the goods promote seed growth.

In light of our findings that (1) the constituent components of Opposer’s pleaded SEED+ mark are conceptually weak and that the term “seed” in Opposer’s mark is commercially weak, and (2) the marks at issue are dissimilar in connotation and engender dissimilar overall commercial impressions, we find that Opposer’s and Applicant’s marks are not similar for likelihood of confusion purposes. *See Safer, Inc.*, 94 USPQ2d at 1044 (DEER-B-GON for “animal repellant used to repel deer and other ruminant animals and rabbits” is not likely to cause confusion with DEER AWAY for “repellant for repelling deer, other big game, and rabbits.”).

Thus, the first *DuPont* factor does not favor a finding of likelihood of confusion.

7. Nature and Extent of Any Actual Confusion/Length of Time During and Conditions Under Which There Has Been Concurrent Use Without Evidence of Actual Confusion.

⁴⁵ *Id.*

DuPont factor 7 considers the “nature and extent of any actual confusion.” *DuPont*, 177 USPQ at 567. *DuPont* factor 8 considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *Id.* Applicant maintains that “Opposer has not provided evidence of actual confusion among the purchasing public.”⁴⁶ Additionally, Applicant argues that “[t]here is also no evidence of any customer having returned goods either to Applicant or Opposer because they were confused between the marks.”⁴⁷

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enterps. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well

⁴⁶ Applicant’s Trial Brief, p. 28; 30 TTABVUE 33.

⁴⁷ *Id.*

suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”). Further, the similarity of the goods, as well as trade channels, is relevant when assessing whether the absence of actual confusion is indicative of likelihood of confusion. *See In re Guild Mortg.*, 129 USPQ2d at 1164.

Here, although Applicant has amended the filing basis of its involved application to an intent-to-use application, Applicant nonetheless has stated that it has used its SEEDUP mark for less than a year.⁴⁸ Additionally, there is no evidence of record concerning the extent of Applicant’s use during this time.

In view thereof, we are not persuaded on this record that the absence of any evidence of actual confusion is entitled to significant weight in our likelihood of confusion analysis, particularly in light of the limited time Applicant has purportedly used its mark in commerce. We therefore find that the seventh and eighth *DuPont* factors to be neutral in this case.

8. Extent of Potential Confusion.

The twelfth *DuPont* factor considers the “extent of potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 177 USPQ at 567. Applicant argues that the extent of potential for confusion is de minimus.⁴⁹ In support of its position, Applicant contends that Opposer uses a third party to directly market to prospective customers and provide technical information and advice prior to purchase.⁵⁰ In light

⁴⁸ See Opposer’s Notice of Reliance, Exh. 11 (Applicant’s Response to Opposer’s Interrogatory No. 9); 12 TTABVUE 107.

⁴⁹ Applicant’s Trial Brief, p. 28; 30 TTABVUE 33.

⁵⁰ *Id.*

of this personal contact with potential customers, Applicant asserts that Opposer's consumers are well informed about Opposer's product they intend to purchase and, therefore, the prospect of confusion with Applicant's SEEDUP goods is minimal.⁵¹

We find Applicant's argument applies to the sophistication of Opposer's relevant consumers and not as to whether the potential for confusion would be substantial or de minimis. Nonetheless, in assessing the extent of potential confusion, given the totality of the evidence in this record, we find that the potential for confusion is de minimis because of the dissimilarities in meaning and overall commercial impression of Opposer's and Applicant's marks and the weakness of the constituent components of Opposer's pleaded SEED+ mark.

Thus, the twelfth *DuPont* factor does not favor a finding of likelihood of confusion.

9. Thirteenth DuPont Factor – Lack of Policing/Enforcement

The thirteenth *DuPont* factor “relates ‘to any other established fact probative of the effect of use.’” *DuPont*, 177 USPQ at 567. Under this *DuPont* factor, Applicant argues that although Opposer has allegedly used the SEED+ mark for over 40 years, it has never inquired or challenged any mark that incorporates the term SEED for goods that are identical or similar to Opposer's goods.⁵² Specifically, Applicant maintains that, during discovery, Opposer was presented with numerous registrations for marks purportedly similar to Opposer's SEED+ mark and Opposer

⁵¹ *Id.*

⁵² *Id.*, at 29; 30 TTABVUE 34.

replied that it was unaware of these marks.⁵³ Applicant further contends that although nearly two years have passed since being informed of these marks for similar products, Opposer has failed to provide evidence it initiated even a single inquiry to the alleged infringer or an enforcement action with the Board or a court against any of the owners of these third-party marks.⁵⁴

In response, Opposer argues that it “should not be penalized for not over-reaching and filing unnecessary litigation.”⁵⁵ That being said, Opposer further concedes that although it has not initiated any direct inquiry to any purported infringer identified by Applicant, it has nonetheless had direct discussions internally with its counsel about one of these third-party marks.⁵⁶

The fact that Opposer has not initiated any inquiry or taken any legal action against the owners of the third-party marks identified by Applicant does not necessarily mean that Opposer has not effectively policed its SEED+ mark. Opposer may believe that the third-party marks identified by Applicant are not sufficiently similar to Opposer’s pleaded SEED+ mark to warrant such action.

Thus, we find the thirteenth *Dupont* factor regarding the lack of policing to be neutral.

IV. Balancing of Factors

We have considered all of the arguments and evidence of record, and all relevant

⁵³ 21 TTABVUE 33-37.

⁵⁴ *Id.*

⁵⁵ Opposer’s Reply Brief, at p. 21; 31 TTABVUE 22.

⁵⁶ *Id.*, at pp. 21-22; 31 TTABVUE 22-23.

DuPont factors for which there is argument and evidence. We find that while Opposer's and Applicant's goods are highly related and would travel in overlapping trade channels and be offered to overlapping classes of consumers, we nonetheless conclude that the parties' respective marks are sufficiently dissimilar in connotation and overall commercial impression to weigh against a conclusion that confusion is likely. *See Kellogg Co. v. Pack'em Enterprises*, 951 F.2d 330, 21 UPSQ2d 1142, 1145 (Fed. Cir. 1991) (a single *DuPont* factor may be dispositive). Our conclusion is buttressed by the facts that (1) Opposer's pleaded mark is conceptually weak and the term "seed" in Opposer's mark is commercially weak; and (2) by the very nature of the parties' respective parties goods, relevant purchasers of the goods would exercise a higher degree care in making their purchasing decisions. Thus, we find that Opposer has not established by a preponderance of the evidence that confusion is likely under Section 2(d) of the Trademark Act.

Decision: The opposition is dismissed.